No. 15834

In the United States Court of Appeals for the Ninth Circuit

ROBERT AIKEN, L. A. WOLLAM, BERNARD W. ANDERSON AND LLOYD CAMPBELL, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The decision of the district court (R. 46-52) is not reported.

JURISDICTION

This is an appeal from the judgment of the district court entered October 31, 1957. Notice of appeal was filed November 22, 1957. The jurisdiction of the district court of this suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a lease of lands within an Indian Irrigation Project obligated the lessee to pay irrigation op-

eration and maintenance assessments as required by regulations of the Department of the Interior regardless of whether water was actually demanded.

2. Whether the United States lost its right to the debt due on the assessments because of failure to press collection efforts in the most expeditious manner.

STATEMENT

This suit was brought by the United States in August 1952 to collect delinquent charges and accrued interest assessed against Indian lands leased to defendant, Robert Aiken. These charges were for the purpose of paying operation and maintenance costs of the Blackfeet Indian Irrigation Project, Montana, where the leased lands were located (R. 3-10). The leases are of allotted lands within the Blackfeet Reservation and are executed by the allottees as lessors and non-allottee farmers as lessees. These charges are requird by regulations issued pursuant to statute by the Secretary of the Interior and were published originally on May 28, 1942, in section 171.26 of Title 25, C.F.R., 7 F.R. 3958. The regulations now appear at 25 C.F.R. sec. 171.11. They require any lessee within an irrigation project to pay, in the amounts determined by the Secretary or his representative, the operation and maintenance charges, including penalties, assessed against the irrigable acreage of the lease.

The complaint states two causes of action: The first is for delinquent charges under a lease made in 1944, and the second cause of action is based upon delinquent charges from a 1946 lease. The defendants' answer puts at issue, insofar as this appeal is concerned, whether the leased lands were in fact irrigable, whether the parties did or had intended to contract with re-

spect to irrigable lands or dry farm lands, and whether the United States had waived its rights to recover the operation and maintenance charges (R. 38-46).

The 1944 invitation to bid, the 1944 bid and both leases are found in the record, pp. 10-37. The 1944 invitation to bid contained this pertinent provision (R. 11):

> In the irrigable area, at least one year of the five must be allotted to the use of a legume such as alfalfa or sweet clover. Where it is necessary to practice weed eradication by summerfallow, the lessee may do so, and *there will be no charge for water. But this elimination of water charge may be for one year, only, out of five.* * * * Dry land farming is prohibited in this area and *the water rental is payable in advance.*[1]

Mr. Aiken's 1944 acceptance bid was unqualified (R. 14). The 1944 lease, on an April 1929 printed Form 5-180a, had this provision typed on its face (R. 16):

> *All land to be farmed as irrigated farm land* on a crop rotation basis. This rotation must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown in time to permit sufficient growth for winter cover. * * * If it is shown to be necessary to practice weed eradication for one year only out of 5, *water charges will not be required for that year if water is not used.*

The 1946 lease, on an August 1943 printed Form No. 5-180, had this provision typed on its face (R. 33):

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[1] Emphasis supplied throughout this brief.

> *All land to be farmed as irrigated farm land* on a crop rotation basis. This land must consist of at least one leguminous crop for one season over all the lease. In justified cases a year of summer fallow for weed control will be permitted, but a suitable cover crop must be sown by August 20th in time to permit sufficient growth for winter cover. * * * *Irrigation water assessment to be paid at same time rental is paid.*

Also the 1946 lease contained in the printed part of the form this provision (R. 33):

> 6. Operation and Maintenance.—It is understood and agreed that the lessee will pay all operation and maintenance assessments annually in advance on the due date preceding each irrigation season, including any penalties, accruing against the above-described land under irrigation, pursuant to the existing or future orders of the Secretary of the Interior (Title 25—Indians, CFR, part 130).

The case came on for trial in January, 1956. The district court filed its written decision on September 4, 1957, in which it held that the United States had established the material allegations of the complaint and that judgment should be accordingly awarded to it (R. 46-52). Findings of fact, conclusions of law and the judgment followed on October 31, 1957 (R. 52-59). The district court found that the lands were at all times included within the Blackfeet Indian Irrigation Project (R. 53). The district court's decision took notice of the basic regulation, of which the defendant was charged with knowledge, providing that leases of Indian lands within an irrigation project

shall require the lessee to pay the operation and maintenance charges, including penalties assessed against the irrigable acreage of the lease (R. 46-47).

The district court found that the defendants had covenanted and agreed to pay all operation and maintenance assessments levied against the leased lands (R. 53-54). It was held that the advertisement for the 1944 lease made it plain to the bidder what liability he would incur if he leased land in the irrigable area (R. 48-49). The district court further held that "it is clearly expressed that defendant under both leases was required to farm the lands as irrigated lands on a crop rotation basis; in other words, that an irrigated farm operation was required of the defendant" (R. 49). The court later continues, "there seems to be no question that this irrigation project contained a system of canals and irrigation ditches * * * for the use of this defendant under his leases, and while there is conflict in the testimony as to the feasibility of irrigating some of this leased land, as it appears to the Court from the evidence, irrigation facilities were available to the lessee" (R. 50).

The district court held the defendants entered these leases knowing the character of the soil, the nature and extent of the irrigation system and the existing conditions and regulations governing the use of lands under the project, knowing that dry land farming was prohibited and that operation and maintenance charges were required to be paid (R. 50-51). The district court stated in its opinion that it did seem that a serious oversight or neglect had taken place for which government agents were responsible after so many years had elapsed before a demand for payment. However, the court concluded, after a review of the facts,

that it felt obliged to hold that the defendant must have been fully aware of the extent of his liability, and there did not appear to be any valid reason for depriving the Government and the Indian allottees of the indebtedness due under the leases (R. 51-52).

The evidence at the trial upon which these findings and conclusions were based may be summarized as follows: Mr. Paul G. Anspach, retired project engineer for the Blackfeet Irrigation Project, testified generally on the irrigation facilities available to the leased land and other background information on the operation and maintenance charges. Mr. Anspach identified as plaintiff's exhibits, No. 1, a map of the area (R. 68); No. 2, the status account of the irrigable acreage and water charges for Mr. Aiken's 1944 lease, which had been originally made in 1944 with amounts entered as they became due (R. 75); No. 3, the same status account for the 1946 lease (R. 77); and No. 4, a copy of the statement of charges mailed to Mr. Aiken (R. 79). Mr. Anspach was project engineer from 1938 to 1950 (R. 80). In this capacity Mr. Anspach had by personal observation and work on the irrigation system become thoroughly familiar with the land in the project (R. 80, 81, 82, 100, 104, 135, 141-142). Mr. Anspach had been over the land leased by Mr. Aiken prior to the time he leased it (R. 80). He had been over the land many times in surveys and the locations of ditches (R. 100). Mr. Anspach inspected the irrigation ditches, determined whether they would hold water and whether they should be cleaned (R. 104). Mr. Anspach identified plaintiff's exhibit No. 7, the official project map, and testified that he had personally made surveys based on that map which showed the things indicated on the map conformed to

the actual physical facts and that he knew from his own experience and observation that the map was accurate (R. 134, 135, 141-142).

Mr. Anspach had assisted in laying out and supervised construction of the major and minor laterals in the project (R. 81). The major and minor laterals which serve the lands leased by Mr. Aiken were constructed while Mr. Anspach was project engineer (R. 82). They were built in 1941, prior to Mr. Aiken's lease, and were physically located and constructed at the time of Mr. Aiken's 1944 and 1946 leases (R. 83). The water was delivered to the highest points on the land (R. 84). There were several points for delivery of water to the lands leased by Mr. Aiken (R. 83-84). In making the charges, the privilege of summer fallow, for which no charge was made, was allowed the first year of each lease, i.e., no water charge was made in 1944 under the 1944 lease nor in 1946 under the later lease (R. 89-90). Mr. Anspach identified the termini of the irrigation ditches serving Mr. Aiken's leases (R. 97-98). Mr. Anspach testified that the land involved in the leases was irrigable. Irrigability was decided on the basis of a survey made in 1931 and 1932 to determine the irrigability of all tracts in the project (R. 105). The irrigation project was under a duty to deliver water to the farm, but the individual farmer has the obligation of distributing it over the several acres of his holdings (R. 120-121). It was the policy of the project to notify everybody of any unpaid water charges for the previous year in October. If the delinquent charges were not paid by October 31, they were subject to a penalty (R. 123).

The next government witness, Mark W. Stout, is the project engineer who succeeded Mr. Anspach when

he retired in 1950. Mr. Stout identified plaintiff's exhibits Nos. 2, 3 and 4 as part of the official records of his office (R. 84-85).

Mr. Frank Kuka was the following witness. Mr. Kuka is a ditch rider for the Badger-Fisher Blackfeet project, a position he has held for 26 years (R. 147). Mr. Kuka marked on the map, plaintiff's exhibit No. 7, the furtherest points where water was delivered in the major and minor laterals during the time Mr. Aiken had his leases (R. 148-150). Mr. Kuka's testimony was based on his personal observation of the irrigation ditches in the project and he testified as to the specific points he had observed water in the ditches during the years Mr. Aiken had his leases (R. 148-149).

The final witness for the Government was Mr. Charles S. Spencer, Superintendent of the Blackfeet Indian Reservation since 1954 (R. 159). Mr. Spencer identified plaintiff's exhibit No. 8, a copy of the statement mailed to Robert Aiken on January 2, 1948, showing O & M charges due plus interest to January 31, 1947. Mr. Spencer also identified plaintiff's exhibit No. 9, a similar statement mailed to Mr. Aiken about March 23, 1951 (R. 160-163). Mr. Spencer explained that for reasons unknown to him the 1929 form was used in lieu of the 1943 form which should have been used for the 1944 Aiken lease. Mr. Spencer also pointed out the provision in the 1946 lease, which used the 1943 form, requiring payment of O & M charges (R. 167-169).

The first witness for the defendants was Henry L. Henneman who had succeeded Mr. Aiken as lessee (R. 173). Mr. Henneman leased all the irrigated land in the 1946 Aiken lease and all the land in the 1944 Aiken lease except six 40-acre tracts (R. 174). The two

40-acre tracts, the only irrigable land in the 1946 Aiken lease, were leased to Henneman beginning in 1951. The 1951 Henneman lease called for O & M charges. However, at Henneman's request a redetermination was made that, due to the cost of irrigation, the Government was willing to lease the land for dry farming. Accordingly, the O & M charges were taken off the lease and charges previously paid were refunded (R. 191-193).

Henneman held the lease of the north half of the southeast quarter of Section 30 at the same time Aiken held the south half of the same quarter. To use terminal 3 to get to the half of the quarter leased by Aiken it would be necessary, Henneman testified, to cross the part leased by him. However, Henneman testified there was an alternate method of irrigation from terminal 4 (R. 189-190).

Mr. Henneman testified that he had never paid O & M charges under his 1949 lease on the land which had been previously leased to Aiken under the 1944 lease. O & M charges were not payable under this express provision of the lease: "Rentals to be increased by 75¢ per acre on irrigated lands when irrigation service is established; lessee to notify the Blackfeet Indian Office immediately when such service is furnished" (R. 193-194).

On cross-examination, Mr. Henneman admitted that the reason for the refund of water charges on the 1951 lease was that the irrigation ditches had blown full of dirt (R. 197). Mr. Henneman further testified that he now (January 1956) pays O & M charges on the lands covered by his 1949 lease (R. 194-195).

Mr. Frank Kuka, who had previously testified, was called by the defendants. Mr. Kuka stated that the

reason why the land covered by the 1951 Henneman lease could not be irrigated was the summer fallowing Mr. Henneman had done. It caused the ditches to be filled with dirt beyond the high point, although apparently the water could have been delivered to the high point (R. 199-200). Mr. Kuka testified that prior to 1951 this land had been subject to irrigation (R. 204).

The next witness for the defendants was Clarence Parlemee, a rancher who resided in the vicinity of the leased land and was familiar with it (R. 205). Mr. Parlemee testified generally to farming methods on the leased lands and in the vicinity, operation and condition of the irrigation system, and the fact that all his operations were dry land farming (R. 206-212). On cross-examination Mr. Parlemee testified that although he did not use water for irrigation on the land leased in the Blackfeet Irrigation Project he had to pay the O & M charges anyway (R. 214).

Defendants presented the testimony of Lloyd Campbell, Henry L. Henneman and Robert Aiken to show the method of farming, strip farming, during the period Mr. Aiken had the leases (R. 214-232). Mr. Campbell was the chairman of the Pondera County allotment program and farmed about 15 miles from the land in controversy. He had no personal acquaintance with condition of the land during the term of the Aiken leases (R. 216-219).

The final witness was the defendant, Robert Aiken. Mr. Aiken testified he leased 440 acres of the same land in Section 30 prior to the 1944 lease (R. 233-234). He testified that he first came on the land in 1939 without any lease (R. 234). Mr. Aiken testified that he submitted his bid after he had read the notice of the bids

for farming and grazing leases, and that the notice did not specify whether the land was irrigable or not (R. 235-236). He had farmed the land as dry land for five years prior to the 1944 lease (R. 236). Mr. Aiken testified there had been no demand made on him for water rental until around 1950 (R. 236, 238). Mr. Aiken admitted that the leased lands were irrigable from the system of ditches present but maintained that water could not be brought in sufficient quantity for irrigation (R. 237). It was impractical, Mr. Aiken testified, because grain can be irrigated to advantage only about 10 days of the year and "there isn't ditch enough to handle enough water to irrigate that much" (R. 236).

On cross-examination Mr. Aiken admitted that he had received notice of delinquent O & M charges some time prior to February 1949. Defendants accordingly moved to amend their answer, wherein it had been denied that any demand had been made until suit was filed, to conform to the proof (R. 40, 244-245). Mr. Aiken further testified on cross-examination that part of the land in the 1944 lease had been farmed prior to the 1944 lease under an assignment of a lease. The prior lease and assignment were identified and introduced in evidence as plaintiff's exhibits Nos. 14 and 15. The prior lease had provided that the lessee agrees to pay O & M and construction charges as to irrigation, and Mr. Aiken knew, he admitted, that the land could be irrigated "if you wanted to" (R. 246-250). Mr. Aiken testified he knew the land was part of the Badger-Fisher project and that the irrigation ditches were on his property (R. 250).

From the decision and judgment of the district court this appeal followed.

SUMMARY OF ARGUMENT

The principal issue in this case is whether the lessee, Robert Aiken, has agreed in his leases to pay the water assessments. An examination of the lease documents shows clearly that such a promise is contained in both the 1944 and 1946 leases. Both the 1944 invitation to bid and the 1944 lease provide in substance that charges for water are payable on all irrigable land, and that water charges may be eliminated for one year only out of five if no water is used in summer fallowing. These clearly imply the promise to pay the charges for the other four years. Otherwise the language is meaningless. No specific form of words is necessary where it is clear the parties intended an obligation. The courts will enforce promises fairly to be implied from the language of the contract when construed in view of the circumstances present at the time of making. The action of the district court in the case below was simply an enforcement of the obligation to pay water charges clearly implied in the 1944 lease. The 1946 lease contains an express obligation to pay operation and maintenance assessments which requires no discussion.

Appellants' extended discussion about reformation and varying the terms of a written instrument is immaterial under the facts of this case. There has been no reformation by the district court nor was there a variation of a written instrument by parole evidence. The parole evidence argument fails to distinguish between evidence explaining the terms of an agreement and evidence that seeks to contradict express terms. It is a fundamental rule in the construction of contracts that the court may avail itself of the information which the parties possessed to determine the intent

at the time the contract was made. Ascertainment of this information does not offend the parole evidence rule.

Appellants attack the findings of the district court on (1) whether the leased lands could be irrigated and (2) whether Mr. Aiken knew he was obligated to pay the assessments. The district court found in the affirmative on both these issues. This Court, as a federal appellate court, will not retry the factual issues *de novo* from the record. If the findings are sustained by substantial evidence, they must be affirmed. The evidence overwhelmingly supports the district court on both these factual issues.

The obligation to pay the water assessments was independent of the actual use of water. This obligation is based on the very valid reason that the costs of operating an irrigation project do not vary proportionately to the amount of water used, and it would be impossible to operate a project solvently if the individual farmer could determine the amount of water used. But, irrespective of reasonableness, the water assessments were required, without reference to amount of water used, by Department of the Interior regulations published in the Federal Register. Appellants were thus charged with constructive notice of these regulations, and, further, the evidence supports the district court's findings that Mr. Aiken had actual notice of the requirement to pay these charges. The record shows other farmers were required to pay these charges even though no water was used. It is, thus, not a question of a special obligation being placed on Mr. Aiken.

The leases and bonds at issue in this suit were made pursuant to authorization and requirements of federal

law. They are, therefore, construed and enforced in accordance with federal law, with state law being applicable only insofar as it is deemed appropriate in absence of controlling decisions in federal courts.

Even after it has been shown that there was an obligation to pay the operation and maintenance assessments under the leases, appellants further contend the United States has lost the right to collect the debt because the federal agents did not insist upon payment "in advance or at any time during the leases." While it is recognized that the lapse of time indicated in the record may be more than condoned by good business practice, the delay is not so great as suggested. In any event, the rule announced both by this Court and the Supreme Court is that laches or negect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. This rule applies especially where the United States is acting in a trustee capacity for the Indians. Certainly a delay in billing of at most a little over two years cannot affect the Government's rights to collect its debts.

ARGUMENT

I

The District Court Correctly Held the Defendants Agreed by Their Contracts to Pay the Assessments Levied Against Irrigable Lands

A. *The 1944 lease and related documents clearly gave rise to an implied condition to pay the assessments levied on irrigable land and the 1946 lease expressly called for the payment of the assessments:*—The principal issued before the trial court was whether the

appellant, Robert Aiken, as lessee had agreed to pay the water rental assessments for the land under lease. It remains the principal issue on this appeal, and the *sine qua non* to the discussion of all other aspects of the appeal. It is apparent from appellants' brief that the crux of their argument on this appeal is that Mr. Aiken never made an enforceable promise to pay such assessments. All their discussion about lack of evidence to justify reformation, about mutual and unilateral mistake, about varying the terms of a written instrument, and about "obsolete" forms is premised on the assumption that the 1944 lease documents do not contain a promise to pay the water assessments on irrigated farmland. Such assumption is plainly erroneous, as the trial court holds. A brief examination of the documents in question shows why. Typed on the face of the 1944 lease is the provision that all land in the lease was to be farmed as irrigated farmland, and that for one year only out of five, no water charges would be made if no water was used in weed eradication (R. 16). If, after the declaration that the land must be farmed as irrigated land,[2] the lease specifically states that water charges will not be required one year *only* out of five, the condition is implied as clearly as it can be that water charges *must be paid the other four years.* Otherwise, this provision is meaningless since an exception from charges becomes operative only if charges would otherwise be owing. Appellants would simply read this provision out of the contract. Further, this lease was made pursuant to an invitation to bid which also plainly stated that in the irrigable area water

[2] Generally, in the western irrigation areas, lessees of land within irrigation project areas expect to pay charges.

rental was payable in advance and that there may be an elimination of the water charge "for one year, only, out of five" (R. 11). Mr. Aiken's bid pursuant to this invitation did not condition or vary these terms in any respect (R. 14). And it could hardly be argued in view of what has been set out above that the lease document itself does so.

It can be seen, then, that one need look no further than the basic lease document itself to find the promise to pay water assessments. In discussing the words necessary to create a promise, Williston, on Contracts, Sec. 670 (revised ed., 1936), says:

> [n]o form of words is necessary to create a promise or covenant; all that is essential is that on a fair interpretation it shall appear that the alleged promisor has agreed to do the act in question. Not only may promises exist, then, where the language is in terms that of promise, but also where the agreement shows that the parties must have intended an obligation though they failed so to state in clear terms. These promises, implied in fact, as they may be called, are numerous. [Citing examples.]

The doctrine that a court will enforce conditions and promises fairly to be implied from the language of a contract when construed in view of the circumstances present at the time of making has been widely adopted by the federal courts, including this Court, in a variety of situations. Some of the many examples may be found in *Sacramento Nav. Co.* v. *Salz,* 273 U.S. 326, 329 (1927); *Northeast Clackamas C.E. Co-op* v. *Continental Casualty Co.,* 221 F.2d 329, 334 (C.A. 9, 1955); *Texas Industries* v. *Brown,* 218 F.2d 510, 512 (C.A. 5, 1955);

Nevada Half Moon Mining Co. v. *Combined Metals Reduction Co.*, 176 F.2d 73, 75 (C.A. 10, 1949); *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F.2d 340, 347-348 (C.A. 8, 1944); *Montrose Contracting Co.* v. *Westchester County*, 94 F.2d 580, 582 (C.A. 2, 1938); *Diamond Alkali Co.* v. *P. C. Tomson & Co.*, 35 F.2d 117, 120 (C.A. 3, 1929); *Great Lakes, etc. Co.* v. *Scranton Coal Co.*, 239 Fed. 603, 607 (C.A. 7, 1917). The opinion in the *Nevada Half Moon Mining Co.* case, *supra*, enforcing an implied covenant to pay royalty on subsidy payments where such payments were not expressly mentioned in the contract, states (p. 75):

> The cold language contained in a written agreement, standing alone, is not always controlling. (Citing authority.) That which is necessarily implied in a contract is as much a part of it as though expressly stated therein, but the implication must result from the language employed in the instrument and be indispensable to carry the intention of the parties into effect. If it is clear from all the pertinent parts or provisions of the contract taken together and considered in the light of the facts and circumstances surrounding the parties at the time of its execution, that the obligation in question was within the contemplation of the parties or was necessary to carry their intention into effect, it will be implied and enforced. (Citing authority.) And a contract should not be so narrowly or technically interpreted as to frustrate its obvious design *or so loosely construed as to relieve a party of an obligation or liability fairly within its scope or spirit.* (Citing authority.)

When the District Court had seen all the pertinent parts or provisions of the contracts and considered them in the light of the facts and circumstances surrounding the parties at the time of their execution it made the obvious and reasonable holding. The court concluded in its decision of September 4, 1957, that "after a review of the facts—the lease, the advertisement, the bid, the prohibition against dry land farming, the requirement that water charges must be paid, the leasing of lands under an irrigation project supplied with canals and ditches, defendant's familiarity with existing conditions, the Court feels obliged to hold, under all the evidence, that defendant must have been fully aware of the extent of his liability under those two contracts of lease of irrigable Indian lands * * *" (R. 51-52).

The obligation to pay the operation and maintenance assessments under the 1946 lease is so express and unequivocal as to require no discussion. See paragraph 6 of this lease set out at page 33 of the record. Appellants are apparently of the same view (Br. 16).

B. *The decision of the district court did not reform the contracts, or vary the terms of the written documents:*—The appellants' extended argument about reformation of the lease and varying the terms of a written instrument is immaterial under the facts of this case and we shall not burden the Court with a discussion of the law involved in that subject. There has been no reformation of a lease in this case. The obligation to pay water assessments is clearly implied in the language of the 1944 lease itself and this was all the trial court decided. Appellants insinuate this is a case of reformation by saying the trial court's finding of fact "in effect" reformed the 1944 lease (Br. 16). Yet

one searches in vain in the trial court's decision, findings of fact, conclusions of law and judgment for a holding or even a mention that the 1944 lease should be reformed. The trial court made none of the findings which anybody familiar with no more than the rudiments of law would know must be made to justify reformation, e.g., that there was a mutual mistake, or a unilateral mistake with the other party knowing or suspecting, or fraud. There is absolutely nothing in the decision and findings of fact saying how the 1944 lease was incomplete or what provision should be added by appellants' spectral "reformation".

Just as the enforcement of an obligation clearly implied in a contract is not a reformation of that contract, neither is it a variation of a written instrument by parole evidence. For this reason appellant's argument that the decision of the trial court "in effect" varies the terms of a written instrument by parole evidence is also untrue (Br. 22). It is not clear from their brief just what "parole evidence" appellants are objecting to. The United States is unaware of any evidence in the record which might offend the parole evidence rule unless it was appellants' own assertion that the land was not irrigable in the face of the express provisions in the contracts that it was to be farmed as irrigated land (R. 16, 33). The appellants' argument is probably based on a failure to distinguish between evidence explaining the terms of the agreement and evidence that seeks to contradict or vary the express terms or set up in addition an unrelated agreement which cannot be fairly implied from the contract. It is a fundamental rule in the construction of contracts that the court may look at the surrounding circumstances and may avail itself of the information

which the parties possessed to determine the intent at the time the contract was made. *Merriam* v. *United States,* 107 U.S. 437 (1882); *Mobile & Montgomery R. Co.* v. *Jurey,* 111 U.S. 584, 591 (1884); *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.,* 178 F. 2d 541, 552 (C.A. 9, 1949); *City of Harlan, Iowa* v. *Duncan Parking Meter Corp.,* 231 F. 2d 840, 842 (C.A. 8, 1956); *W. C. Sheperd Co.* v. *Royal Indemnity Co.,* 192 F. 2d 710, 715 (C.A. 5, 1951); *Baker* v. *W. J. Kennedy Dairy Co.,* 77 F. 2d 574, 576 (C.A. 6, 1935); *Indemnity Ins. Co. of North America* v. *Sloan,* 68 F. 2d 222, 228 (C.A. 4, 1934); *Operators Oil Co.* v. *Barbre,* 65 F. 2d 857, 860 (C.A. 10, 1933). The rule is amply supported also in cases cited in the trial court's opinion (R. 49-50). The trial court looked at the language of the contract and at the circumstances and information the parties had at the date of making. From this it determined what the contract meant. This procedure is proper and in accordance with the applicable principles of law, and appellants are in error in trying to make it either a reformation or parole variance of the contract.

The discussion in this point has been limited to the 1944 lease. It is unnecessary to discuss the 1946 lease since appellants admit that it explicitly contained the provision for payment of operation and maintenance assessments (Br. 16).

C. Federal appellate courts do not retry factual issues or substitute its judgment on such issues for that of the trial court:—Interspersed in appellants' brief there recurs an attack on the findings of the trial court on these two purely factual questions: (1) whether the leased lands could be irrigated and (2) whether the defendant Aiken knew he was obligated to pay the assess-

ments for the irrigation project. The trial court has found in the affirmative on both these issues (R. 50, 51-52). If appellants now want to attack the findings of the trial court the burden of proof is on them to point out specifically where these findings are clearly erroneous, and mere assertion does not shift the burden. *Glen Falls Indemnity Co.* v. *United States,* 229 F. 2d 370, 373 (C.A. 9, 1955). This Court, as a federal appellate court, will not retry the factual issues in the case *de novo* from the record. *Lew Wah Fook* v. *Brownell,* 218 F. 2d 924, 925 (C.A. 9, 1955). Nor will this Court substitute its judgment for that of the trial court. *General Casualty Co.* v. *School District No. 5,* 233 F. 2d 526, 527-528 (C.A. 9, 1956). No authority is given except to the district courts to make new findings of fact. *Hycon Mfg. Co.* v. *H. Koch & Sons,* 219 F. 2d 353, 355 (C.A. 9, 1955). If the findings are sustained by substantial, competent evidence they must be affirmed. *Ruud* v. *American Packing & Provision Co.,* 177 F. 2d 538, 540 (C.A. 9, 1949). The findings of the trial court are presumptively correct and must be sustained unless clearly erroneous. Rule 52a, F.R. Civ. P.; *General Casualty Co.* v. *School District No. 5, supra; Glenn Falls Indemnity Co.* v. *United States, supra; Hycon Mfg. Co.* v. *H. Koch & Sons, supra; Lew Wah Fook* v. *Brownell, supra; Gamewell Co.* v. *City of Phoenix,* 216 Fed. 2d 928, 931 (C.A. 9, 1954); *Ruud* v. *American Packing & Provision Co., supra.* There can be no serious question, as the trial court found, that irrigation facilities were available to the land leased by Mr. Aiken. The evidence overwhelmingly supported this conclusion. Mr. Aiken, himself, testified to this fact when he said in answer to the question whether he knew the land was irrigable,

that he knew one could have ordered water and paid for it "if you wanted it" (R. 249). And, later: "Q. But in any event you knew that land was subject to irrigation? A. I knew it could be irrigated" (R. 250). The leases that Mr. Aiken signed clearly stated in typing on the front of the lease form that all the leased land was "to be farmed as irrigated farm land * * *" (R. 16, 33). These leases were accepted without protest. The official land map showed the lands were irrigable (R. 105, 134-135). The government witnesses Anspach and Kuka testified the lands in question were irrigable. (See, *supra,* for summary of testimony, pp. 6-8.)

Against this preponderance of direct evidence, appellants snipe at such ancillary matters as the type of soil and whether in the personal opinion of a particular farmer the land was more suitable for irrigation or strip farming (Br. 16-18). There might be a difference of opinion, of course, among persons familiar with the subject matter whether a particular parcel of land, under all the circumstances, was better suited for dry farming or irrigation. It is not, in any event, for the court to determine in this case whether dry farming or irrigation farming is the best use of the land. The trial court that heard all the evidence on both sides held that the irrigation facilities were available to Mr. Aiken and that he knew the extent of his liability under the contracts (R. 50, 52). If Mr. Aiken had any doubts about the irrigability of this land, he might have raised the issue before he entered his leases. It is hardly appropriate now, however, to ask this Court to reweigh the evidence and reach a different conclusion from that of the trial court's when its findings are

plainly supported by the preponderance of the evidence.

D. The obligation to pay operation and maintenance assessments was not dependent on actual use of water: —That the lessee did not use any water does not excuse him from his obligation to pay operation and maintenance charges. The leased Indian land being within the irrigation project the Code of Federal Regulations requires that the provision for payment of these charges in the amount prescribed by the Secretary of Interior be included in the lease. 25 C.F.R. sec. 171.26, promulgated by the Secretary of the Interior May 2, 1942; 7 F.R. 3958; same regulation now appears at 25 C.F.R. sec. 171.11. The regulation does not condition payment on the amount of water received, or on receiving any water, for very valid reasons. This assessment was for the purpose of running the entire project. The expenses for an irrigation project are largely fixed and do not vary at all proportionately to the amount of water delivered. It would be impossible to operate the irrigation project solvently if each farmer could decide for himself whether he would participate.[3]

But, irrespective of the reasonableness, the regulation was validly published in the Federal Register and appellants were charged with constructive notice of the provisions, even assuming they had no actual notice, that they were required to pay operation and maintenance charges. *F.C.I.C.* v. *Merrill,* 332 U.S. 380, 384 (1947); *Flannagan* v. *United States,* 145 F. 2d 740, 741 (C.A. 9, 1944).

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[3] State irrigation districts likewise generally assess operation and maintenance charges in the same manner as other taxes against all property in the irrigation project without regard to actual water use. See Kinney on Irrigation and Water Rights, (2d Ed., 1912) Section 1422.

Moreover, there is ample evidence in the record to support the finding of the trial court that the appellant, Aiken, did have actual notice of the obligation of leaseholders under the irrigation project to pay operation and maintenance charges (R. 51). The invitation to bid gave actual notice when it stated of the irrigable area that, "Dry land farming is prohibited in this area and the water rental is payable in advance" (R. 11). And, as we have shown above, the language in the lease was enough to give notice that water rentals would be payable for four years of the lease term (*supra,* pp. 15-16).

Further, it was shown at the trial that payment of the operation and maintenance assessment without actual use of water is not a special burden being placed on Mr. Aiken alone. Generally the lessees in the area must fulfill this obligation. Mr. Parlemee testified he had to pay the assessment even though he used no water (R. 214). Mr. Henneman now pays operation and maintenance charges, although he has never used any water (R. 194-195, 177). Indeed from this record it would appear Mr. Aiken now seeks a special exemption from the payment of these charges which is not available to others similarly situated.

Clearly, then, the obigation to pay operation and maintenance assessments existed without regard to the amount of water used and Mr. Aiken had both constructive and actual notice of this fact. Because he used no water does not and should not prevent enforcement of this obligation.

E. *The enforcement and interpretation of the contracts are governed by federal rather than state law*:— The leases and bonds at issue in this suit were made pursuant to authorization and requirements of federal

law. It is now established beyond doubt that contracts by which the Federal Government executes its constitutional functions and powers such as protection of dependent Indians are construed and enforced by federal law and rights thereunder cannot be limited or modified by state law. As this Court said in *United States* v. *Jones,* 176 F.2d 278, 281 (1949), quoting from *United States* v. *Allegheny County*, 322 U.S. 174, 182 (1944):

> Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. * * * The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

This rule applies to leases as well as any other type of contract. *American Houses* v. *Schneider*, 211 F.2d 881, 882 (C.A. 3, 1954); *Girard Trust Co.* v. *United States*, 149 F.2d 872, 874 (C.A. 3, 1945). Other cases holding that the validity and construction of contracts in which the United States has an interest are governed by federal law are *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943); *Duncan* v. *United States*, 32 U.S. (7 Pet.) 433 (1833); *United States* v. *Latrobe Construction Co.,* 246 F.2d 357, 360-363, (C.A. 8, 1957); *Woodward* v. *United States,* 167 F.2d 774, 778-779, (C.A. 8, 1948). See *United States* v. *Standard Oil Company of California,* 332 U.S. 301, 307-308 (1947), for a discussion of the "federal common law" applicable in these cases. In such cases the courts apply federal law and, in the absence of controlling federal statutes or

decisions, the general law on the subject with state law being applicable only insofar as it deemed appropriate as a basis for the federal remedy. *United States* v. *Independent School No. 1,* 209 F.2d 578, 580 (C.A. 10, 1954); *Girard Trust Co.* v. *United States*, 149 F.2d 872, 874 (C.A. 3, 1945).

That federal law is controlling is pointed out in view of the exclusive citation of Montana statutory law and Montana decisions in appellants' brief. It is inferred from this, although appellants never specifically state it, that they consider these contracts governed by Montana law. The Montana authorities are, in any event, almost entirely inapplicable to the present case for reasons pointed out elsewhere in this brief. We do not believe that there would be any difference in outcome under Montana law and under federal law and hence no controlling issue as to which law applies is presented.

II

Appellants Were Not Relieved of Their Obligations to Pay Assessments by Statutes of Limitations, Laches, or Failure of Agents to Enforce Valid Debts Owing to the Government

Once it is established that there was an obligation to pay operation and maintenance assessments under the leases, appellants further contend that the United States has lost its right to collect the debt because its agents did not insist "upon payment of the O & M assessments, either in advance or at any time during the leases" (Br. 28-29, 13). The appellee recognizes that on the present record, the lapse of time between the inception of the obligation and demand for payment was greater than is condoned by good business practices. What extenuating circumstances there might be outside the record are not material and will not be argued.

We believe that an examination of the facts in the record will disclose, however, that the lapse of time was not so great as has been suggested. Mr. Anspach testified that an assessment was not made the first year of each lease because of summer fallow (R. 89-90). He further testified that it was the policy to notify everybody in October if they had unpaid water charges for that year or previous years and, if unpaid, the penalty attached only after October 31 (R. 123). The record further indicates that Mr. Aiken was mailed a notice of O & M charges due at least by January 2, 1948 (R. 160-161). At most the delay under the 1944 lease was from October 1945 to January 1948, a little over two years, and under the 1946 lease, the delay was only the few months from October 1947 to January 1948.

Having examined the record to ascertain the exact extent of the delay, let us turn to the legal principles to see whether, in any event, government agents could by their failure to act cause the United States to forfeit an obligation otherwise owing. It is the rule announced both by this Court and by the Supreme Court that laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409 (1917); *Chanslor-Canfield Midway Oil Co.* v. *United States,* 266 Fed. 145, 150 (C.A. 9, 1920). Only recently this Court has said:

> The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and

> officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

United States v. *Ahtanum Irrigation District,* 236 F. 2d 321, 334 (1956), quoting from *United States* v. *California,* 332 U.S. 19, 40 (1947). Even assuming that government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the interests of the Government are not to be forfeited as a result. *United States* v. *California, supra.* These rules especially apply where the United States is acting in a trustee capacity for the Indians. *United States* v. *State of Washington,* 233 F. 2d 811 817 (C.A. 9, 1956); *United States* v. *Ahtanum Irrigation District, supra.* Indeed, where there has been a positive agreement, it has been held that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *United States* v. *City and County of San Francisco,* 310 U.S. 16, 31-32 (1940); *City and County of San Francisco* v. *United States,* 223 F. 2d 737, 739 (C.A. 9, 1955), cert. den. 350 U.S. 903. Similarly, oral statements beyond the scope of a government agent's authority do not estop the Government from asserting its rights. *Utah* v. *United States,* 284 U.S. 534, 545-546 (1932). And of course there is no question that the state statutes of limitations are inapplicable. *United States* v. *Summerlin,* 310 U.S. 414, 416 (1940); *United States* v. *Minnesota,* 270 U.S. 181,196 (1926). Unreasonable delay in instituting an action does not bar the Government from collecting its debts.

United States v. *Sharp,* 216 F. 2d 602, 604 (C.A. 9, 1954).

Judged by the above line of authorities the facts in the present case could not possibly raise any valid bar to the Government's collection of its just obligations. Nor was the delay in this case unreasonable when compared with other cases where these authorities have been applied. In *Jones* v. *United States,* 195 F. 2d 707, 709 (C.A. 9, 1952), "agents of the Bureau of Land Management stood idly by while Kelly built the Moose Creek Lodge upon the property in question and for five years permitted the defendant Jones to make additional improvements there without bringing any action or taking any steps to eject him," and it was held that this did not affect the Government's title or right to possession of the property. And in *City and County of San Francisco* v. *United States,* 223 F. 2d 737, 739 (C.A. 9, 1955), cert. den. 350 U.S. 903, this Court held that the Secretary of the Interior's acquiescence of 10 years before making a claim and 19 years before bringing a suit did not affect a valid obligation owing to the Government. Certainly, a little over, at most, two years cannot affect the Government's right to collect its debts.

Therefore, under the controlling rules of law, the trial court was correct in holding:

> * * * under all the evidence, that defendant must have been fully aware of the extent of his liability under those two contracts of lease of irrigable Indian lands, although the Superintendent of the reservation, or some one qualified to act in his behalf, may have been negligent in not collecting these charges when they were due and payable under the contracts. This does not appear to af-

ford any valid reason for depriving the Government and the Indian allottees of collecting the indebtedness due under the leases. (R. 52).

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the district court is correct and should be affirmed.

Respectfully,

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